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No. ____

In the Supreme Court of the United States

MONESA SUNDERLAND,

Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Washington State Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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May 2, 2008

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment to the Constitution and this Court's case law—including *Armstrong v. Manzo*, 380 U.S. 545 (1965), *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)—require that a party who is *known* to have asserted a parental relationship with a child and is *known* to have initiated an adoption proceeding regarding that child be given adequate notice and a meaningful opportunity to participate in a competing adoption proceeding before the child can be adopted by another individual?

PARTIES

In addition to the parties listed in the caption, the following parties were defendants below and are respondents in this case:

Adoptive Parents

Guardian ad Litem

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Monesa Sunderland respectfully petitions for a writ of certiorari to review the judgment of the Washington State Court of Appeals in this case.

OPINIONS BELOW

The decision of the Superior Court of Washington is unpublished and is reproduced in the appendix ("Pet. App.") at 18–23. The Washington Court of Appeals' opinion is published at 156 P.3d 940 (Wash. Ct. App. 2007), and is reproduced at Pet. App. 1–17. The Washington Supreme Court's order denying discretionary review of the Washington Court of Appeals' opinion is reported at 178 P.3d 1033 (Wash. 2008), and is reproduced at Pet. App. 24.

JURISDICTION

The Washington Court of Appeals filed its opinion on April 30, 2007, and the Washington Supreme Court denied discretionary review on February 6, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state

> shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 26.33.240(1) of the Revised Code of Washington provides:

> After the reports required by RCW 26.33.190 and 26.33.200 have been filed, the court shall schedule a hearing on the petition for adoption upon request of the petitioner for adoption. Notice of the date, time, and place of hearing shall be given to the petitioner and any person or agency whose consent to adoption is required under RCW 26.33.160, unless the person or agency has waived in writing the right to receive notice of the hearing. If the child is an Indian child, notice shall also be given to the child's tribe. Notice shall be given in the manner prescribed by RCW 26.33.310.

Section 26.33.160(1) of the Revised Code of Washington provides:

> Except as otherwise provided in RCW 26.33.170, consent to an adoption shall be required of the following if applicable: (a) The adoptee, if fourteen years of age or older; (b) The parents and any alleged father of an adoptee under eighteen years of age; (c) An agency or the department to whom the adoptee has been relinquished pursuant to

RCW 26.33.080; and (d) The legal guardian of the adoptee.

STATEMENT OF THE CASE

This petition arises out of the efforts of Monesa Sunderland to adopt her niece, R.L.M., a child with whom Ms. Sunderland had established a deep and caring relationship. Despite knowing that Ms. Sunderland claimed to have developed a parental relationship with R.L.M., and despite knowing that she had initiated an adoption proceeding regarding R.L.M., the state court allowed two other individuals—referred to as "Adoptive Parents"—to adopt R.L.M. without providing to Ms. Sunderland adequate notice of or a meaningful opportunity to participate in the competing adoption proceeding. The deprivation of the basic requirements of adequate notice and a meaningful opportunity to participate violated Ms. Sunderland's procedural due process rights under the Fourteenth Amendment to the United States Constitution.

That deprivation also conflicts with this Court's opinions in *Armstrong v. Manzo*, 380 U.S. 545 (1965), *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Those cases, as set forth below, require that a party who is *known* to have asserted a parental relationship with a child and is *known* to have initiated an adoption proceeding regarding that child be given adequate notice and a meaningful opportunity to participate in a competing adoption proceeding before the child can be adopted by another individual. The state court conditioned Ms. Sunderland's due process rights on a factual showing that she was precluded from

making. As the foregoing cases establish, the state court's analysis conflicts with this Court's established framework for deciding such issues.

I. MS. SUNDERLAND'S RELATIONSHIP WITH R.L.M. AND HER INITIAL EFFORTS TO ADOPT R.L.M.

Ms. Sunderland is the paternal aunt of R.L.M. and served for most of the child's life as one of her primary caregivers. R.L.M.'s biological parents struggled with drug problems, and they often left R.L.M. in Ms. Sunderland's care. As the state court acknowledged, Ms. Sunderland could have presented evidence to the state courts that she took on the duties and responsibilities of a parent during R.L.M.'s formative years. Pet. App. 2–3, 15. It was Ms. Sunderland who planned R.L.M.'s birthday parties. *Id.* at 15. It was Ms. Sunderland who brought R.L.M. to her first day of school. *Id.* Indeed, Ms. Sunderland "regularly cared for [R.L.M.] for days at a time." *Id.* Through this challenging time, Ms. Sunderland developed a strong emotional and psychological bond with R.L.M.—in other words, a "parental relationship"—precisely like that between a biological parent and child.

The Washington Department of Social and Health Services ("DSHS") eventually intervened due to R.L.M.'s parents' inability to care for R.L.M. themselves. *See id.* 2–3. DSHS removed R.L.M. from the care of her biological parents on March 3, 2004. *See id.* at 2. The same day, DSHS initiated a dependency petition in Washington juvenile court (the "Dependency Action"), to place R.L.M. in the formal care of the state. *See id.* at 3. As a result of

the Dependency Action, DSHS became R.L.M.'s legal guardian. *Id.* When DSHS takes over legal guardianship of a child, the agency is obligated to make placement decisions consistent with the best interest of the child. *Cf. State, Dep't of Social & Health Servs. v. Hileman (In re Dependency of R.H.)*, 117 P.3d 1179, 1181 (Wash. App. 2005) (acknowledging that "the State, through [DSHS], has a compelling interest in protecting" the fundamental rights of children to health and safety and that the "right to parent [a] child is a fundamental constitutional right," and stating that, "the more important the substantive rights, the more important the procedural protections"). Because of the existing relationship between Ms. Sunderland and R.L.M., DSHS concluded that placing R.L.M. in Ms. Sunderland's care was consistent with R.L.M.'s best interest.

In March 2005, DSHS removed R.L.M. from Ms. Sunderland's home due to drug issues prompted by the separation of Ms. Sunderland and her longtime partner. Pet. App. 3. Ms. Sunderland immediately agreed to complete a drug recovery program as well as parenting classes, *id.*, and also committed in writing to compliance with all necessary procedures in order to once again become a viable placement option for R.L.M. Ms. Sunderland successfully completed the drug treatment and parenting classes, *id.*, and has remained clean and sober since.

In September 2005, "[a]fter completing her drug rehabilitation program and parenting classes, . . . [Ms.] Sunderland moved to intervene" in the Dependency Action, which remained pending in

juvenile court. Pet. App. 3. On September 28, 2005, the court commissioner granted Ms. Sunderland's motion to intervene. DSHS thereafter filed a motion to revise, which was granted on October 26, 2005, thereby excluding Ms. Sunderland from the Dependency Action. *See id.* at 3–4.

II. THE ADOPTIVE PARENTS' COMPETING PETITION TO ADOPT R.L.M.

After DSHS removed R.L.M. from Ms. Sunderland's home in March 2005, DSHS placed R.L.M. in a foster home with the Adoptive Parents. Because of the Dependency Action described above, the Adoptive Parents were well aware of Ms. Sunderland's relationship with R.L.M. and knew that Ms. Sunderland wanted to adopt R.L.M. Yet as discussed below, the Adoptive Parents filed a competing petition to adopt R.L.M. ("the Adoption Proceeding") and consistently failed to provide Ms. Sunderland with any notice of that proceeding. The state court failed in that regard as well, thus depriving Ms. Sunderland of any meaningful opportunity to be heard before her parental rights were permanently extinguished.

The Adoptive Parents filed a petition to adopt R.L.M. on October 13, 2005. Pet. App. 3. When they filed this petition, Ms. Sunderland had already been granted intervenor status in the Dependency Action, which was pending. *Id.* at 3, 10. The Adoptive Parents, as the current placement for R.L.M., were aware of the pendency of the Dependency Action and knew Ms. Sunderland had been granted intervenor status. DSHS, too, was aware of both the Dependency Action, including the fact that Ms. Sunderland had been granted intervenor status, and the

Adoption Proceeding filed by the Adoptive Parents. The Guardian ad Litem ("GAL") also knew that Ms. Sunderland had been granted intervenor status in the Dependency Action and that the Adoptive Parents had commenced the Adoption Proceeding. Yet, none of these parties—not the Adoptive Parents, not DSHS, not the GAL, and not the state court—provided any notice to Ms. Sunderland of the Adoption Proceeding.

This fundamental deficiency in the Adoption Proceeding was repeated over and over as the Adoption Proceeding and the Dependency Action proceeded simultaneously. Indeed, it was compounded: DSHS and the GAL appeared at a hearing in the Dependency Action on October 25, 2006, but neither one informed the trial court or Ms. Sunderland that the Adoptive Parents had already filed an adoption petition. And then the same constitutional deficiency was compounded again: when Ms. Sunderland's attorney specifically asked whether any competing adoption petition had been filed, the lawyer representing DSHS falsely told him that no such petition had been filed.

The Adoptive Parents pushed along the Adoption Proceeding, all the while disregarding Ms. Sunderland's interest in the proceedings. On November 10, 2005, the Adoptive Parents and DSHS filed various materials in support of the Adoptive Parents' adoption petition and noted the petition for a hearing on November 21, 2005. Pet. App. 4. They again provided no notice to Ms. Sunderland that they had petitioned to adopt R.L.M., *id.*, and that the petition—if granted—would preclude Ms. Sunder-

land from adopting R.L.M. and permanently extinguish Ms. Sunderland's parental rights.

When the hearing on the adoption petition convened on November 21, 2005, the Adoptive Parents finally disclosed to the court that Ms. Sunderland had filed a competing adoption petition. *See* Pet. App. 4–5. The court ordered a recess at 11:40 a.m. It asked the Adoptive Parents to inform Ms. Sunderland's counsel—for the first time—that a hearing to decide the competing adoption petition would be held at 3:20 p.m. that same day. *See id.*

This last minute scramble was wholly inadequate and was too late to provide Ms. Sunderland with a meaningful opportunity to participate. Counsel for the Adoptive Parents telephoned Ms. Sunderland's attorney, Richard Okrent, at 12:10 p.m. and merely left a voicemail regarding the hearing three hours later. *Id.* at 5. Because Mr. Okrent was on vacation, his office arranged for his associate, Ruth Westbrook, to appear on his behalf via telephone. *Id.* Ms. Sunderland, due to the lack of timely notice, was unable to attend. *Id.*

Thus, Ms. Westbrook had to attend a hearing to resolve competing claims to adopt R.L.M. with only a few hours to prepare on a case on which she had never worked. Sensibly, Ms. Westbrook requested a reasonable opportunity to present Ms. Sunderland's claim: she requested a continuance and an opportunity to present Ms. Sunderland's case in a joined proceeding. *Id.* Ms. Westbrook also moved to permit Ms. Sunderland to intervene in the Adoption Proceeding. *Id.*

Despite the lack of timely notice and the significance of the rights involved, the court denied Ms. Sunderland's request for a continuance, ruling that "[i]t is not in the child's best interests" to allow intervention because doing so would delay the Adoption Proceeding. *See id.* at 19. The court then granted the Adoptive Parents' competing adoption petition and scheduled a hearing to consider an order drafted by counsel for Adoptive Parents. *See id.* at 5.

Upon his return from vacation, Ms. Sunderland's attorney received a copy of the proposed order and immediately filed objections and moved for reconsideration. The court made minor modifications to the proposed order, but otherwise denied all the relief Ms. Sunderland requested. In so doing, the court refused Ms. Sunderland's request that it at least *consider* her interest in adopting R.L.M. before permitting Adoptive Parents to do so. Having been effectively shut out of the Adoption Proceeding, Ms. Sunderland timely filed her notice of appeal in the Washington Court of Appeals.

III. APPELLATE PROCEEDINGS

On appeal, Ms. Sunderland argued that the denial of notice and a meaningful opportunity to be heard violated her due process rights under the Fourteenth Amendment to the United States Constitution (as well as the state constitution). *Id.* at 8. Addressing the federal constitutional issues, Ms. Sunderland began with a specific reference to this Court's decision in *Armstrong v. Manzo*, 380 U.S. 545 (1965), and argued—as the Court held in *Armstrong*, *id.* at 552—that notice is insufficient if

not provided at a meaningful time and in a meaningful manner.

Ms. Sunderland also emphasized in her brief the interests served by these fundamental due process requirements. Citing this Court's opinion in *Heller v. Doe by Doe*, 509 U.S. 312, 332 (1993), Ms. Sunderland explained that under the Due Process Clause of the Constitution "the interest of a person subject to governmental action is in the accurate determination of the matters before the court, not in a result more favorable to him." Quoting *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 50 (1990), and *Fuentes v. Shevin*, 407 U.S. 67, 97 (1972), Ms. Sunderland further explained that the procedural safeguards that are guaranteed by the United States Constitution exist to "ensure the accuracy" of legal determinations and "prevent unfair and mistaken deprivations."

DSHS, on the other hand, argued that Ms. Sunderland was entitled to no notice whatsoever of the Adoption Proceeding despite her relationship with R.L.M. and despite the parties' knowledge of Ms. Sunderland's efforts to adopt R.L.M. On reply, Ms. Sunderland specifically pointed out that DSHS's argument—if accepted—would eliminate the ability of Washington courts "to ensure that adoption proceedings comply with procedural due process protections of the State and Federal Constitutions."

The Washington Court of Appeals rejected Ms. Sunderland's due process arguments. The court correctly noted that Ms. Sunderland had asserted "that she was denied procedural due process, which is guaranteed by both our federal and our state

constitutions," and it specifically referenced the Fourteenth Amendment to the United States Constitution. Pet. App. 8 & n.7. The court also correctly acknowledged that a state legislature "cannot limit the constitutional rights of its citizens by statute." *Id.* at 8. Based on this premise, the court rightly concluded that Ms. Sunderland could present her constitutional challenge to the Adoption Proceeding on appeal despite the limits placed on such appeals by the Washington legislature. *Id.* at 8–9.

Although the Court of Appeals began by appropriately acknowledging that the Fourteenth Amendment prohibits a state legislature from depriving individuals of their federal due process rights, the court quickly departed from that fundamental premise. It concluded that Ms. Sunderland was entitled to neither adequate notice nor a meaningful opportunity to be heard in the Adoption Proceeding because (1) she did not fall within the class of persons the state legislature determined were entitled to notice under Washington's adoption statutes (*id.* at 9–10 (citing Wash. Rev. Code § 26.33.240(1))), and (2) she had not established that she was R.L.M.'s de facto or psychological parent (*id.* at 14–16).

This holding violates deeply rooted due process principles. The Washington Court of Appeals acknowledged that Ms. Sunderland "would be entitled to due process . . . if she could show that she was R.L.M.'s de facto parent," *id.* at 14, but concluded that Ms. Sunderland had not made an adequate showing that she was such a parent. *Id.* at 15 ("The *record* does not support considering Sunderland R.L.M.'s de facto parent." (emphasis added)). The

critical flaw in the court's analysis is obvious: without adequate notice and a meaningful opportunity to participate in the Adoption Proceeding, Ms. Sunderland was denied the ability to develop the record to support her claim. By creating such an insurmountable hurdle, the state court's decision renders meaningless the due process rights of individuals like Ms. Sunderland, thus violating longstanding due process principles.

Recognizing that the court had decided an important question of federal law in a way that conflicts with this Court's constitutional jurisprudence, Ms. Sunderland filed a timely petition for review by the Washington Supreme Court. As in her briefs before the Washington Court of Appeals, Ms. Sunderland sought to vindicate her due process rights under both the United States Constitution and the Washington Constitution. Relying on *Armstrong* and other relevant cases, Ms. Sunderland specifically argued that the Court of Appeals' decision conflicted with this Court's case law. She therefore asked the Washington Supreme Court to grant review and reverse the Court of Appeals' erroneous decision.

The Washington Supreme Court denied Ms. Sunderland's petition for review on February 6, 2008. Pet. App. 24. Ms. Sunderland now asks this Court to review the state court's decision and provide appropriate guidance to lower courts regarding the due process rights of individuals who—like Ms. Sunderland—are known or believed to have developed a parental relationship with a child who is subject to adoption in a state-court proceeding.

REASONS FOR GRANTING THE PETITION

Ms. Sunderland's petition raises an important question of federal law: namely, what process is due to an individual who claims to have formed a parental bond with a child before her parental rights may be permanently extinguished by placing the child with another individual in an adoption proceeding? As shown in Section I below, the liberty interest at issue in this case—the interest of parental figures in the care, custody, and control of their children—is among the oldest and most fundamental liberty interests recognized by this Court. In recent years, states have recognized that individuals who are not parents by birth or legal decree nonetheless acquire this interest by forming a parental bond with a child. The constitutional and practical significance of a state's recognition of such parental rights is an important question that has not been, but should be, settled by this Court.

Although this Court has not specifically addressed the constitutional significance of evolving parental rights under the Due Process Clause, it has of course provided a framework by which to decide whether individuals like Ms. Sunderland are entitled to adequate notice and a meaningful opportunity to be heard. That framework is set forth in a long line of cases, including *Armstrong*, *Mathews*, and *Hamdi*. As discussed in Sections II and III below, the state court failed to apply this Court's constitutional framework. The state court's conclusion, therefore, conflicts with applicable decisions of this Court regarding these fundamental due process principles.

The significance of this matter is profound and directly affects some of the most vulnerable in society: children in adoption proceedings whose parents are no longer willing or able to care for them properly. Over 50,000 children are adopted every year in proceedings that involve public child welfare agencies like DSHS. *See* U.S. Children's Bureau, Administration for Children, Youth & Families, Trends in Foster Care & Adoption—FY 2002–FY 2006, http://www.acf.hhs.gov/programs/cb/stats_research/afcars/trends_02-06.pdf. Nearly 80,000 children each year lose their legal connection to their parents through termination of parental rights. *Id.* These children, and the adults with whom they have formed significant and profound relationships, are the ones placed most at risk by the state court's decision here.

As traditional notices of "parent" and "family" continue to evolve, states will continue to struggle—as they have already—to define the due process rights of individuals who, like Ms. Sunderland, have a parental relationship with a child but are not parents by birth or legal decree. If states are to condition an individual's parental rights on establishing that the individual is a de facto parent, a psychological parent, or some other similar legal construct, then the Due Process Clause of the Fourteenth Amendment requires that the individual be given the opportunity to make that showing. The Court should grant this petition, among other reasons, to provide adequate guidance on this novel and important question of federal law.

I. THE STATE COURT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW REGARDING FUNDAMENTAL DUE PROCESS RIGHTS.

The Court has long recognized the importance of the fundamental liberty interest involved here. In *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality op.), for example, the Court observed: "The liberty in-terest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.* at 65. In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Court similarly noted: "It is cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.* at 166. These cases, and others like them, consistently recognize a fundamental constitutional dimension to the rights of parents to direct the upbringing of their children.

This Court has likewise recognized that conceptions of parent and family have evolved over time: "The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household." *Troxel*, 530 U.S. at 63. Accordingly, this Court has held that the family bonds entitled to constitutional protection are not limited to biological ones; instead, the constitution similarly protects emotional and psychological family bonds as well. In *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977), for example, the Court explained that "the impor-

tance of the familial relationship . . . stems from the emotional attachments that derive from the intimacy of daily association." *Id.* at 844. The Court added: "No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship." *Id.*

This Court's recognition of the constitutional protections to which these sorts of relationships are entitled reflects the fact that, over the last 30–40 years, states have granted legal recognition to these nonbiological familial relationships. In Washington, such an adult is often referred to as a "de facto" parent. According to the Washington Supreme Court, such a relationship exists if (1) the child's legal parent "consented to and fostered the parent-like relationship" between the child and the alleged de facto parent; (2) the child lived with the person claiming de facto parent status; (3) the person assumed parental obligations without expectation of financial compensation; and (4) the person has "been in a parental role for a length of time sufficient to have established . . . a bonded, dependent relationship" with the child. *In re Parentage of L.B.*, 122 P.3d 161, 176 (Wash. 2005), *cert. denied sub nom. Britain v. Carvin*, 547 U.S. 1143 (2006). A "*de facto* parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise." *Id.* at 177.

Nor is Washington alone in recognizing that a legally significant relationship between an adult and a child may exist in the absence of a biological relationship. At least 22 other states and the District of Columbia have similarly done so. *See* Pet.

App. 25–26 (collecting citations to relevant opinions in those other states). Some state courts, like the Washington Supreme Court in *Parentage of L.B.*, refer to such individuals as "de facto parents." *See, e.g., E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891 (Mass.), *cert. denied*, 528 U.S. 1005 (1999). Other state courts refer to such individuals as "psychological parents." *See, e.g., V.C. v. M.J.B.*, 748 A.2d 539, 551–52 (N.J.), *cert. denied*, 531 U.S. 926 (2000). In some cases, like this one, courts use "de facto parent" and "psychological parent" interchangeably. *See, e.g.*, Pet. App. 11; *Rubano v. DiCenzo*, 759 A.2d 959, 974 (R.I. 2000). But regardless of what legal construct a state court adopts, the result is the same: an individual who is not a parent by birth or legal decree nonetheless can have a liberty interest that is protected by state law.

Because that liberty interest is necessarily established by state law, a de facto parent in Washington, like a parent by birth or legal decree, enjoys a fundamental constitutional interest in the care and custody of his or her children. Where an individual claims to be a de facto parent, that individual necessarily has the same rights and privileges this Court has afforded to parents by birth or legal decree under the Due Process Clause of the Fourteenth Amendment to the Constitution. This includes the guarantee to due process, in the form of notice and a meaningful opportunity to be heard, prior to any state-sanctioned dissolution of the de facto family.

The significance of these rights are at their zenith when a child is the subject of an adoption proceeding. Only in an adoption proceeding is it possible that the type of "deeply loving and inter-

dependent relationship between an adult and a child" that this Court acknowledged in *Smith*, 431 U.S. at 844, may be terminated in favor of an outsider. As noted on page 14 above, nearly 80,000 children each year lose their legal connection to their parents through termination of parental rights. Thus, protecting the due process rights of such individuals—parent and child alike—is clearly a matter of profound importance.

Addressing the due process claims of parents by birth, the Court has appropriately recognized the significance of due process protections in adoption proceedings, confirming that due process protection—including adequate notice and a meaningful opportunity to be heard—is paramount in this context. In *Armstrong*, a case on which Ms. Sunderland heavily relied, the Court found that failure to give a parent adequate notice of an adoption proceeding "violated the most rudimentary demands of due process of law." 380 U.S. at 550. The Court described such notice as a "basic requirement" because "the result of the judicial proceeding was *permanently* to deprive a legitimate parent of all that parenthood implies." *Id.* (emphasis added). As the Court in *Armstrong* held, a state may not, consistent with due process, take such an action without providing notice "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections [before the court considers the merits of a party's arguments].'" *Id.* at 550 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Thus, with respect to parents by birth, *Armstrong* requires

notice to that parent of an adoption proceeding before—not after—the proceeding commences.

If Ms. Sunderland were R.L.M.'s parent by birth or legal decree, the Court's opinion in *Armstrong* would clearly require reversal of the state court's adoption decree on due process grounds. The state court reached a contrary conclusion only because Ms. Sunderland is not R.L.M.'s biological parent and because Ms. Sunderland had not been given an opportunity to establish that she is R.L.M.'s de facto parent and therefore entitled to notice under Section 26.33.240(1) of the Revised Code of Washington. *See Parentage of L.B.*, 122 P.3d at 177 (recognizing that de facto parents have the same rights as parents by birth or legal decree). Without proper guidance from this Court, lower courts will continue to struggle with such issues, fracturing on these critical due process issues and continuing to allow individuals like Ms. Sunderland to lose their parental rights without even the basic opportunity to present their claims. Such a result is contrary to fundamental due process principles and this Court's Fourteenth Amendment jurisprudence.

This petition presents an opportunity for this Court to prevent such widespread injustice by providing needed legal principles to protect the due process rights of de facto parents, psychological parents, and other like individuals. Where, as here, a participant in an adoption proceeding knows or believes that another individual has asserted a parental relationship with the child (and, indeed, that individual is known to have initiated an adoption proceeding regarding that child), the Due Process Clause of the Fourteenth Amendment to the

Constitution *requires* that the individual be given adequate notice and a meaningful opportunity to be heard. As in *Armstrong*, anything less would "violate[] the most rudimentary demands of due process of law." 380 U.S. at 550.

II. THE STATE COURT'S OPINION CONFLICTS WITH THIS COURT'S DECISIONS IN ARMSTRONG v. MANZO AND MATHEWS v. ELDRIDGE.

At bottom, the state court in this matter sanctioned a result that is both unconstitutional and untenable under this Court's case law. The result is substantially similar to the result this Court struck down in *Armstrong*, where a divorced father, like Ms. Sunderland, was not given adequate notice and a meaningful opportunity to participate in an adoption proceeding affecting his child. 380 U.S. at 548. By allowing a similar deprivation of parental rights—without adequate notice or a meaningful opportunity to be heard in the Adoption Proceeding—the state court plainly decided an important question of federal law that has not been, but should be, settled by this Court *and* it did so in a way that conflicts with relevant decisions of this Court, including *Armstrong*.

The state court's opinion likewise conflicts with the due process principles that this Court established in *Mathews*. The Court in *Mathews* established a framework for determining "the process due in any given instance." *Hamdi*, 542 U.S. at 529. That framework has three distinct prongs:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. Although Ms. Sunderland addressed all three prongs in her briefing before the state court, the court did not address any of these prongs in its opinion. Nor did it mention or purport to apply this constitutional analysis. *See generally* Pet. App. 1–17.

Had the state court properly applied this three-part test, it would have concluded that Ms. Sunderland--like Mr. Armstrong—should have been provided adequate notice and a meaningful opportunity to participate in the Adoption Proceeding. With regard to the first prong of the *Mathews* test, the private interest at issue here is Ms. Sunderland's parental interest in participating in decisions involving the care and custody of R.L.M. Without adequate notice of the Adoption Proceeding, the type of "deeply loving and interdependent relationship between an adult and a child" that this Court recognized in *Smith*, 431 U.S. at 844, would be shattered without Ms. Sunderland's participation—and even without her knowledge.

Turning to the second prong of the *Mathews* test, the risk of erroneously terminating Ms. Sunderland's

parental rights is self-evident. At the time the trial court ruled in the Adoption Proceeding, Ms. Sunderland had not been given an adequate opportunity to present evidence regarding her parental relationship with R.L.M. Thus, the trial court was in no position to evaluate Ms. Sunderland's parental relationship to R.L.M.—including the strong emotional and psychological bond that had developed between Ms. Sunderland and R.L.M.—in deciding whether or not to place R.L.M. with the Adoptive Parents. Without this information, the loss of Ms. Sunderland's parental rights was a *fait accompli*. The state court's opinion confirms this point: it determined that the "record" did not support Ms. Sunderland's argument that she had a parental relationship with R.L.M. even though Ms. Sunderland was deprived of the opportunity to develop such a record. Pet. App. 15. Conversely, with proper procedural safeguards, including adequate notice to Ms. Sunderland, the trial court's ability to properly resolve the Adoption Proceeding is improved immeasurably.

Finally, the Government's interest in the *correct* resolution of an adoption proceeding is equally profound. The most significant aspect of that interest is not simply expediting the proceedings, but in determining whether the potential adoption is truly in the best interests of the child. *See In re Welfare of Maurer*, 530 P.3d 1338, 1339 (Wash. App. 1975). Where, as here, a participant in an adoption proceeding knows or believes that another individual has a parent-like relationship to the child (and, indeed, has initiated an adoption proceeding regarding that child), no significant administrative burden would be required in order to provide ade-

quate notice of the pending adoption proceeding. Thus, the third *Mathews* prong, like the others, requires that individuals like Ms. Sunderland receive adequate notice and a meaningful opportunity to be heard before their parental rights are effectively terminated.

The state court failed to apply or even mention this framework. Nor does its analysis reflect any of the considerations that *Mathews* engrained in due process jurisprudence more than thirty years ago. But even more troubling, the state court injected a precondition to the constitutional right to due process that conflicts with *Mathews*. The state court held as follows:

> Procedural due process applies only in situations where a person is being deprived of something to which she has a right. Because Sunderland had no legally[]recognized interest in the custody of R.L.M. and no right to intervene in the adoption proceedings, *she would be entitled to due process only if she could show that she was R.L.M.'s de facto parent.*

Pet. App. 14 (footnote omitted, emphasis added). This holding was based only on state law. *Id.* at 14 n.27 (citing *In re Dependency of J.H.*, 815 P.2d 1380, 1387–88 (Wash. 1991)). The state court, in other words, held that a state law requirement that Ms. Sunderland present proof that she was a de facto parent—*evidence that she was precluded from offering*—precluded Ms. Sunderland from being entitled to adequate notice or a meaningful opportunity to be heard in the Adoption Proceeding.

The state court's analysis effectively renders the due process rights of such persons utterly meaningless. Individuals who are not parents by birth or legal decree cannot participate in an adoption proceeding unless they establish that they are de facto parents. But without any ability to participate at a meaningful time and in a meaningful manner (as required by federal due process principles), such individuals cannot possibly make that showing. The state court's holding thus ensures that individuals who are *known* to have asserted a parental relationship with a child will be denied the constitutional right to notice and an opportunity to be heard and thereby demonstrate the existence of that parental relationship. This rule is wholly untenable.

The fundamental flaw in the state court's analysis is that it misapplies *Mathews*. The first prong in *Mathews* examines "the private interest that will be affected by the official action." *Mathews*, 424 U.S. at 335. Here, that interest is Ms. Sunderland's parental interest in participating in decisions involving the care and custody of R.L.M.—a child with whom Ms. Sunderland had established a deeply loving and interdependent relationship. If states are to condition such participation on satisfying a specific legal standard, such as that set forth in the state court's opinion (quoted on page 23 above), then the Due Process Clause requires that such individuals be given adequate notice and a meaningful opportunity to be heard on that point.

In short, the state court's analysis has broad implications, not only in light of the ever-changing nature of parental relationships but also as it relates to the constitutional right to adequate notice and a meaningful opportunity to be heard. While states have

some power to define what constitutes a protected liberty interest under state law, they cannot condition due process protection on an individual's ability to establish such a liberty interest and then deny those same individuals any meaningful opportunity to make that showing. The Court should grant this petition, among other reasons, to provide adequate guidance on this novel and important question of federal law.

III. THE STATE COURT'S OPINION ALSO CONFLICTS WITH THIS COURT'S DECISION IN *HAMDI v. RUMSFELD*.

In addition to conflicting with *Mathews*, the state court's decision conflicts with this Court's opinion in *Hamdi*. In *Hamdi*, this Court rejected an analogous rule that permitted the deprivation of rights to hinge on a classification without providing the individual a meaningful opportunity to challenge the classification. Here too, the state court's opinion conditions an individual's entitlement to due process rights on his or her classification as a de facto parent, while at the same time it effectively prevents individuals from making that showing.

Hamdi involved the due process rights of individuals who are classified as "enemy combatants." If an individual is so classified, he or she may be detained by the government without charges until the cessation of military hostilities, subject only to military process. 542 U.S. at 518–19; *see also id.* at 560–61 (Scalia, J., dissenting). Individuals not classified as enemy combatants, are entitled to the full panoply of procedural protections from ordinary criminal proceedings. *See id.* at 560–61 (Scalia, J.,

dissenting). Thus, just as an individual's classification as a de facto parent is determinative under the state court's analysis in this case, the classification as an enemy combatant was likewise determinative under *Hamdi*.

Addressing the due process rights of such individuals, the Court in *Hamdi* held that "a citizen-detainee seeking to challenge his classification as an enemy combatant *must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker*." *Id.* at 533 (emphasis added). The Court reached this conclusion based on the three-part test in *Mathews*, which it recognized as the framework for determining "the process due in any given instance." *Id.* at 529. In discussing the appropriate level of process, the Court noted that "[a]ny process in which . . . factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the [petitioner] to demonstrate otherwise falls constitutionally short." *Id.* at 537. At a bare minimum, a combatant must be permitted "to present his own factual case to rebut" his classification. *Id.* at 538.

The state court's analysis here conflicts with *Hamdi*. Like the petitioner in *Hamdi*, whose rights were dependant on his classification as an enemy combatant, Ms. Sunderland's parental rights (according to the state court's holding) were dependant on her classification as a de facto parent under Washington law. Also like the petitioner in *Hamdi*, Ms. Sunderland was denied a meaningful opportunity to challenge the state court's determination that she was not a de facto parent. The state court

faulted Ms. Sunderland for failing to make such a showing even though she had been excluded from the proceeding and prevented from submitting that evidence. If the state court is to require such evidence, then *Hamdi* (like *Mathews*) requires that individuals be given notice and a meaningful opportunity to present relevant evidence. The state court's analysis conflicts with that holding.

Lastly, the state court's holding also raises an important issue regarding the proper role of state courts in enforcing the United States Constitution. The state court concluded its opinion by noting: "While we understand the difficult position in which this decision places family members seeking to adopt, this is an issue that must be resolved by the legislature, not the appellate court." Pet. App. 16. Contrary to state court's conclusion, this Court has repeatedly recognized that state courts are equally responsible for enforcing the United States Constitution and protecting the constitutional rights of citizens. *See, e.g.*, *Robb v. Connolly*, 111 U.S. 624, 637 (1884); *Swickler v. Koota*, 389 U.S. 241, 245 (1967) ("During most of the Nation's first century, Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws."). The state court's failure to properly protect the due process rights of individuals like Ms. Sunderland—like its other failings—warrants this Court's review.

CONCLUSION

For each of these reasons, this Court should grant a writ of certiorari to review the judgment of the Washington State Court of Appeals.

Respectfully submitted,

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156 P.3d 940

Court of Appeals of Washington, Division 1.
In the Matter of the ADOPTION OF R.L.M., a minor, DOB: 10/18/99. Monesa Sunderland, Appellant,
v.
State of Washington, Department of Social and Health Services, and Adoptive Parents, Respondents.
No. 57557-1-I.

April 30, 2007.

Leonard J. Feldman, Matthew Aaron Carvalho, Heller Ehrman LLP, Seattle, WA, for Appellant.

Monesa Sunderland, Everett, WA, (Appearing Pro Se).

Christian Williams, Attorney Generals Office, Seattle, WA, Michael Scott Majors, Office of Attorney General, Everett, WA, for Respondents.

Kirsten Jensen Haugen, Everett, for Minor.

Linda Eileen Passey, Law Office of Linda Passey, Marysville, for Other Parties.

AGID, J.

¶ 1 R.L.M. is a seven year old girl. Monesa Sunderland is her paternal aunt. When R.L.M. was four years old, the Department of Social and Health Services (DSHS) removed her from her parents and placed her with Sunderland. DSHS later removed R.L.M. from Sunderland because of her drug use and

placed the child with a foster-adopt family. Sunderland completed a drug recovery program and parenting classes and sought to adopt R.L.M. R.L.M.'s foster parents also petitioned for adoption. Sunderland was given only three hours notice of the competing adoption hearing and neither she nor her attorney could attend the hearing. An associate of her attorney asked that Sunderland be given an opportunity to present evidence that it was in R.L.M.'s best interests to be adopted by her rather than the foster parents. The superior court denied this request and granted the other adoption petition. Sunderland argues that the court erred by denying her right to notice and a hearing and by denying permissive intervention under CR 24(b). We hold that Sunderland had no statutory or due process right to notice and a hearing because she was not R.L.M.'s parent, legal guardian, or de facto parent. We decline to consider Sunderland's permissive intervention argument because a mere procedural error is an insufficient basis for challenging a finalized adoption decree under RCW 26.33.260(3).

FACTS

¶ 2 R.L.M. was born on October 18, 1999. DSHS removed her from her mother based on allegations of drug use and neglect. At the time, her father was incarcerated on drug charges. Monesa Sunderland is R.L.M.'s paternal aunt and claims she helped to raise the child from birth. In March 2004, DSHS placed

R.L.M. with Sunderland after removing her from her mother. On February 22, 2005, R.L.M.'s parents' parental rights were terminated, and DSHS became her legal guardian. Around January 2005, Sunderland began using methamphetamine after she and her longtime partner separated. When DSHS found out about the drug use, it required her to sign an agreement to stop using drugs and submit to random drug testing. She signed the agreement, but later tested positive for drugs. On March 1, 2005, DSHS removed R.L.M. from Sunderland because of her drug use and placed R.L.M. with a foster-adopt family. Sunderland immediately entered a drug treatment program. She completed the intensive out-patient phase in May 2005 and continued her recovery with aftercare and support groups. She also took parenting classes because she hoped to regain custody of R.L.M.

Competing Adoption Petitions

¶ 3 After completing her drug rehabilitation program and parenting classes, Sunderland sought to become R.L.M.'s permanent placement. On September 28, 2005, Sunderland moved to intervene in R.L.M.'s pending dependency case. A commissioner granted her intervenor status and set a non-contested adoption review for October 31, 2005. On October 13, 2005, R.L.M.'s foster parents filed a petition to adopt R.L.M. They did not serve Sunderland with their petition. On October 17, Sunderland completed a pre-placement adoption report in preparation to petition to adopt R.L.M. On October 26, 2005, the superior

court entered an order reversing the commissioner's decision and denying Sunderland intervention because it found that allowing her party status in the dependency was not in R.L.M.'s best interests.

¶ 4 On November 9, 2005, Sunderland also filed a petition to adopt R.L.M., without the necessary DSHS consent required under RCW 26.33.160. She included her pre-placement report with this filing. The report conditionally recommended Sunderland as an adoptive parent, stating that she would be a suitable permanent placement for R.L.M. provided that she "continue in the recovery lifestyle she has applied since her treatment seven months ago, including parenting work, counseling and relocating out of her neighborhood." Sunderland was unable to file the necessary post-placement report because R.L.M. had not lived with her since March 2005.

¶ 5 On November 10, 2005, DSHS filed its consent to adoption by the foster family, waiver of right to notice of any further hearings related to the adoption, and pre-placement and post-placement reports recommending R.L.M.'s foster family adopt her. That same day, R.L.M.'s foster-adopt parents filed a calendar note setting the adoption hearing for November 21, 2005. They did not serve Sunderland with notice of this hearing.

¶ 6 On the morning of November 21, 2005, the hearing on the foster parents' adoption petition began. At the hearing, the court became aware of the competing adoption petition Sunderland had filed and

decided to set the hearing over until 3:20 p.m. to give Sunderland a chance to appear before the court. Counsel for the foster parents called Sunderland's attorney at 12:10 p.m. and left a message about the afternoon hearing. Sunderland's attorney was on vacation but his associate, Ruth Westbrook, arranged to appear by telephone. Neither Sunderland nor her attorney was able to attend the afternoon hearing. At that hearing, Westbrook asked for a continuance and joinder of the two adoption proceedings. She also asked the court to permit Sunderland to intervene in the competing adoption proceeding.[1] The court denied Sunderland's requests and granted the foster parents' adoption petition. On December 6, 2005, Sunderland moved for reconsideration of the adoption decision and submitted a memorandum about her objections to the proposed order. On December 7, 2005, the trial court entered its final order granting the adoption. Sunderland appeals.

DISCUSSION

I. *Motion to Correct Sunderland's Brief Under RAP 10.7*

¶ 7 We must initially determine whether to grant DSHS' motion to correct Sunderland's brief under RAP 10.7, requesting that all references in her

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[1] DSHS and the adoptive parents contest this finding, claiming that the reference to intervention in the minute entry is a scrivener's error.

brief to material not in the record be stricken. Sunderland's brief repeatedly references the transcript from the dependency hearing, at which the superior court denied Sunderland's motion for permissive intervention in R.L.M.'s dependency proceedings. This transcript is not part of the record. RAP 10.3(5) requires that all factual statements must be supported by reference to the record. Sunderland's reference to a document not in the record violates this rule.

¶ 8 Sunderland argues that we should consider the additional dependency proceeding evidence under RAP 9.11, but did not formally move to add the evidence under the rule. RAP 9.11 allows this court to consider additional evidence if it is necessary to "fairly resolve the issues on review." Here, the trial court was aware that the superior court denied intervention on revision. In fact, the trial court explicitly based its decision not to join the two adoption petitions partly on the order in the dependency case denying Sunderland intervention. Because the additional evidence offered is not necessary to the resolution of this case, we need not decide whether it could be considered under RAP 9.11.

¶ 9 Sunderland also contends that this court should take judicial notice of the dependency transcript because the dependency proceeding is "engrafted, ancillary, or supplementary" to the adoption

proceeding.[2] The Supreme Court rejected this argument in *In re Adoption of B.T.*[3] It refused to take judicial notice of the records from B.T.'s earlier dependency proceedings because an adoption and a dependency action are "two separate judicial proceedings."[4] We decline to take judicial notice of the dependency transcript.

¶ 10 RAP 10.7 grants this court the discretion to order correction of a brief or accept it without considering the erroneous references. We deny DSHS' motion to correct appellant's brief. We have not considered and do not need to consider the erroneously-cited dependency proceeding transcript because there is ample evidence of what occurred at that proceeding in the record properly before us, and further consideration of the dependency proceedings is not necessary to resolve the issues on appeal.

II. *Procedural Challenge to the Adoption Decree*

¶ 11 DSHS argues that Sunderland cannot appeal the decree of adoption based on the issues she raises. The legislature intended that an adoption decree "provide finality for adoptive placements and stable homes for children."[5] To that end, the legislature has

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[2] *See Swak v. Dep't of Labor & Indus.*, 40 Wash.2d 51, 53, 240 P.2d 560 (1952).

[3] 150 Wash.2d 409, 78 P.3d 634 (2003).

[4] *Id.* at 415, 78 P.3d 634.

[5] RCW 26.33.260(4).

limited the grounds for challenging an adoption on appeal.[6] RCW 26.33.260(3) states that:

> (3) Except as otherwise provided in RCW 26.33.160(3) and (4)(h), no person may challenge an adoption decree on the grounds of:
>
> (a) A person claiming or alleging paternity subsequently appears and alleges lack of prior notice of the proceeding; or
>
> (b) The adoption proceedings were in any other manner defective.

There is no case law interpreting RCW 26.33.260(3), but no interpretation is necessary to conclude that it prohibits challenges to finalized adoptions based on a procedural error. We therefore hold that Sunderland's claim that the superior court erred by denying permissive intervention is insufficient to challenge the adoption, and we decline to consider it.

III. *Due Process Challenge to the Adoption Decree*

¶ 12 Sunderland's other claim is that she was denied procedural due process, which is guaranteed by both our federal and state constitutions.[7] The legislature cannot limit the constitutional rights of its citizens by statute.[8] We hold that a party alleging a

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[6] RCW 26.33.260.

[7] U.S. CONST. amend. XIV, § 1; WASH. CONST. art. 1 § 3.

[8] *See Seattle Sch. Dist. v. State*, 90 Wash.2d 476, 503, 585 P.2d 71 (1978).

constitutional violation necessarily presents sufficient grounds for challenging an adoption decree under RCW 26.33.260.

¶ 13 "Because the process of adoption is a creature of statute, the adoption statutes must be strictly followed."[9] Under RCW 26.33.240, the only people or agencies entitled to notice of an adoption hearing are those whose consent to the adoption is required under RCW 26.33.160, those who prepared the pre-placement report, and, if the child falls within the definition of an Indian child, her tribe. Under RCW 26.33.160(1), the only relatives whose consent is required for adoption, and who are consequently entitled to notice, are the child's parents, the alleged father of a minor child, or a relative who is also the child's legal guardian.

¶ 14 But adoption is not so technical that the trial court is left without the power to allow intervention of interested parties or to conduct an evidentiary hearing before granting or denying an adoption petition.[10] In *B.T.*, the Washington Supreme Court held that grandparents who had properly obtained intervenor status in their grandchild's dependency action were entitled to notice and an opportunity to

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[9] *B.T.*, 150 Wash.2d at 416, 78 P.3d 634 (citing *In re Adoption of Henderson*, 97 Wash.2d 356, 358, 644 P.2d 1178 (1982)).

[10] *Id.* (citing *In re Adoption of Doe*, 45 Wash.2d 644, 649, 277 P.2d 321 (1954)).

be heard on a competing adoption petition. The court also observed in a footnote that non-parental relatives are not entitled to notice of an adoption proceeding solely by virtue of their biological ties to the adoptee.[11] This court and the Supreme Court have also recognized limited situations where a person in a quasi-parental relationship to a child is entitled to procedural due process.[12]

¶ 15 Sunderland argues that she should have received more than three hours notice of the competing adoption hearing and should have been given a chance to present evidence that adoption by her, rather than R.L.M.'s foster parents, was in R.L.M.'s best interests. Clearly, Sunderland is not entitled to statutory notice under RCW 26.33.240, since she is not R.L.M.'s parent or legal guardian. And her familial tie to R.L.M. grants her no special legal status.[13] Sunderland had intervenor status at the time R.L.M.'s foster parents filed their adoption petition and, therefore, should have received notice of the petition.[14] But, because the superior court later denied intervention on revision, Sunderland was no longer entitled to notice when the court set the date for the foster parents' adoption hearing.

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[11] *Id.* at 419 n. 5, 78 P.3d 634.

[12] *In re Dependency of J.W.H.*, 147 Wash.2d 687, 701, 57 P.3d 266 (2002); *In re Welfare of Hansen*, 24 Wash.App. 27, 36, 599 P.2d 1304 (1979).

[13] *B.T.*, 150 Wash.2d at 419 n. 5, 78 P.3d 634.

[14] *See id.*

¶ 16 Sunderland's argument hinges on her claim that she is entitled to procedural due process as R.L.M's psychological parent. She relies on several decisions granting non-parents procedural due process in actions involving the custody of children based on their quasi-parental relationships to the affected children. In *In re Welfare of Hansen,* we held that due process considerations require courts to give parties who stand in loco parentis to a child a full and meaningful opportunity to present evidence at a hearing to determine the child's status as a dependent child.[15] In *In re Dependency of J.W.H.,* the Supreme Court held that temporary custodians who were petitioning for permanent custody of the children and had obtained intervenor status in the dependency action were entitled to due process.[16] Most recently, in *In re Parentage of L.B.,* the Supreme Court held that a "de facto parent" has a fundamental right, equal to that of a biological or adoptive parent, in the care and custody of a child.[17]

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[15] 24 Wash.App. 27, 36, 599 P.2d 1304 (1979).

[16] 147 Wash.2d 687, 701, 57 P.3d 266 (2002).

[17] 155 Wash.2d 679, 710, 122 P.3d 161 (2005), *cert. denied sub nom. Britain v. Carvin,* ___ U.S. ___, 126 S.Ct. 2021, 164 L.Ed.2d 806 (2006). Appellant does not claim de facto parent status. Instead she claims she is entitled to procedural due process because she is R.L.M.'s psychological parent. She cites *L.B.* solely for its statement that Washington courts have recognized that psychological parent status exists, but the case grants no special legal rights to psychological parents. 155 Wash.2d at 691–92, 122 P.3d 161.

¶ 17 Sunderland's situation is factually and legally distinguishable from all of the cases granting procedural due process rights to non-parents. In *Hansen,* the appellants had cared for the child since she was less than one year old and had been her legal guardians for eight years before the child's biological mother sought to regain custody by petitioning for termination of the guardianship.[18] And it was they who filed the petition to declare the child dependent, in an effort to thwart the mother's efforts to regain custody.[19] Thus, they were only seeking the right to present evidence, at the proceedings they instituted, to ensure that the child they raised was not placed with the mother who abandoned her. In *J.W.H.,* the children's parents voluntarily placed them with their aunt and uncle while the parents participated in a drug rehabilitation program.[20] When the aunt and uncle found out about the sexual abuse the children had suffered, they petitioned for non-parental custody of the children and were granted temporary custody before the state instituted dependency proceedings.[21] They successfully sought intervention of right in the dependency action.[22] The trial court later refused to allow them to present evidence against the dependency which they asserted would result in reunifying

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[18] 24 Wash.App. at 29–30, 599 P.2d 1304.

[19] *Id.* at 30–31, 599 P.2d 1304.

[20] 147 Wash.2d at 690, 57 P.3d 266.

[21] *Id.* at 693, 57 P.3d 266.

[22] *Id.*

the children with the parents who abused them.[23] Thus, they were already parties to the proceeding when they appealed. In *L.B.*, the person seeking custody was the partner of the child's biological mother, with whom she had jointly decided to conceive and raise L.B.[24] And the appellant had raised L.B. as her daughter for six years before she and L.B.'s biological mother separated.[25]

¶ 18 Clearly, the appellants in *J.W.H.* and *Hansen* were in much better positions procedurally than Sunderland, having both been granted legal custodial rights to the children in whose proceedings they were seeking to participate. And, in both cases, the children were still living with the appellants. In contrast, Sunderland has never been R.L.M.'s legal guardian or custodian, and DSHS removed R.L.M. from her care eight months before the adoption hearing. No court has determined that placement with Sunderland was in R.L.M.'s best interests.[26] DSHS initially placed R.L.M. with Sunderland as a relative foster care placement. Foster parents have no due process right to participate in proceedings determining the custody of children placed in their care,

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[23] *Id.* at 693–94, 57 P.3d 266.

[24] 155 Wash.2d at 682, 122 P.3d 161.

[25] *Id.*

[26] *See* RCW 26.10.100 (Non-parental custody is determined based on the best interests of the child.); *see also* RCW 13.34.231(6) (Guardianship is determined based on the best interests of the child.).

even if they have become a child's psychological parent.[27] While the trial court could have allowed Sunderland to intervene,[28] thus giving her the right to notice and an opportunity to participate under *B.T.*, she was ultimately unsuccessful in her attempt to intervene in R.L.M.'s dependency.

¶ 19 Procedural due process applies only in situations where a person is being deprived of something to which she has a right.[29] Because Sunderland had no legally-recognized interest in the custody of R.L.M. and no right to intervene in the adoption proceedings, she would be entitled to due process only if she could show that she was R.L.M.'s de facto parent.

¶ 20 *L.B.* lays out a four part test for determining whether someone is a child's de facto parent: (1) the child's legal parent "consented to and fostered the parent-like relationship" between the child and the alleged de facto parent; (2) the child lived with the person claiming de facto parent status; (3) the person assumed parental obligations without expectation of financial compensation; and (4) the person has "been in a parental role for a length of time

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[27] *In re Dependency of J.H.*, 117 Wash.2d 460, 476–77, 815 P.2d 1380 (1991).

[28] 150 Wash.2d at 419 n. 5, 78 P.3d 634.

[29] *J.H.*, 117 Wash.2d at 472–73, 815 P.2d 1380.

sufficient to have established . . . a bonded, dependent relationship" with the child.[30]

¶ 21 The record does not support considering Sunderland R.L.M.'s de facto parent. Although Sunderland claims to have been involved in R.L.M.'s life from birth, the child lived with her for only one year. There is no evidence to suggest that R.L.M.'s biological parents intentionally fostered a parent-like relationship between R.L.M. and Sunderland. Despite two declarants' statements that Sunderland regularly checked up on R.L.M., bought her clothes and toys, planned her birthday parties, took her to her first day of school, and regularly cared for her for days at a time, there is no evidence that Sunderland lived with R.L.M. before she was declared a dependent child. On the contrary, DSHS removed R.L.M. from her mother's home. In *In re Dependency of D.M.*, we recently held that an aunt and uncle who were adjudicated non-parental custodians of two children after their mother abandoned them, but later lost custody of the children based on allegations of abuse, had no right to participate in the hearing to terminate the children's mother's parental rights because they were not de facto parents.[31] We explained that mere "passive acquiescence" by the biological parent is insufficient to meet the first prong of the de facto parent test, which requires that the parent consent to and

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[30] 155 Wash.2d at 708, 122 P.3d 161.

[31] 136 Wash.App. 387, 398, 149 P.3d 433 (2006).

foster the parent-like relationship.[32] Similarly, Sunderland cannot show that her occasional care of R.L.M. was the result of the child's parents actively fostering a parent-like relationship rather than them merely permitting Sunderland to help out with R.L.M. because their drug problems prevented them from properly caring for her. We hold that Sunderland is not R.L.M.'s de facto parent and, therefore, had no procedural due process right to participate in the competing adoption hearing.

¶ 22 We recognize that the current statutes and case law leave family members seeking to adopt children with whom they may have strong biological and social ties without a remedy in the face of a competing adoption petition by a non-family member who has received consent from DSHS. Under the current law, in the absence of a formal court order granting them custody or guardianship of the child, these non-parental relatives must either have de facto parent status or successfully obtain permissive intervention in the dependency proceedings in order to get notice and an ability to meaningfully participate in a hearing that will forever foreclose their ability to adopt the child. While we understand the difficult position in which this decision places family members seeking to adopt, this is an issue that must be resolved by the legislature, not the appellate court.

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[32] *Id.* at 397, 149 P.3d 433.

¶ 23 We affirm.

WE CONCUR: BAKER, J., and ELLINGTON, A.C.J.

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SUPERIOR COURT OF WASHINGTON COUNTY OF SNOHOMISH	
~~Dependency of:~~ [In re Adoption of: /s/ MD] M., R.L. b.d. 10/18/99	NO: [05-5-00418-4 /s/ MD] **ORDER** (Filed Dec. 7, 2005)

This matter was set for finalization of a petition for adoption at 9:30 this morning, November 21, 2005. After being notified by counsel for the petitioners under Snohomish County Cause No. 05-[5-00418-4 /s/ MD] that another petition for adoption had been filed with regard to this child, the court sought to obtain copies of that petition and court file for review. At 11:15 AM this morning, the court reconvened to consider argument on the issue of proceeding with the adoption under Cause No. 05-[5-00418-4 /s/ MD] in light of the competing petition filed on behalf of Monesa Sunderland under Snohomish County Cause No. 05-5-00457-5. The Court then directed Linda Passey, attorney for the Petitioners seeking to adopt this child today (under Cause No. 05-[5-00418-4 /s/ MD]) to seek to give notice to counsel for the competing petitioner. At 3:30 PM, the Court heard from counsel for both petitioners for adoption (Ruth Westbrook appeared on behalf of Richard Okrent via telephone) and the Department of Social and Health

Service (DSHS), through Chris Williams, Assistant Attorney General. Also present in court were the petitioners for adoption under Cause No. 05-[5-00418-4 /s/ MD], Joanna Blanford, Supervisor and Katherine Graff, Social Worker on behalf of DSHS; Nina Taylor, VGAL Coordinator; Ken Young, VGAL for the child; the child, R.M., and her prospective adoptive sister under 05-[5-00418-4 /s/ MD].

AFTER REVIEWING the testimony and records provided to the court, both competing petitions for adoption of this child, the file in the underlying dependency (Snohomish County Cause No. 04-7-00458-2), letters from three Cherokee Tribes, and HEARING FROM the attorneys for both petitioners for adoption, and DSHS, **IT IS HEREBY FOUND** that:

1. It is not in this particular child's best interests to delay her adoption any longer and, for the following reasons, the court refuses to exercise its discretion to join Ms. Sunderland's petition for adoption with the present action or to delay finalization of the petition to adopt under Cause No. 05-[5-00418-4 /s/ MD] any longer.

2. The child is strongly and positively bonded with her current placement and is observed to be openly affectionate with those caretakers as well as her prospective adoptive sister in that home.

3. The child has been in her current placement over 8 months as of today's date and delaying her

adoption any longer, or threatening its finalization by delaying these proceedings, is very likely to be emotionally devastating to this child.

4. DSHS supports and consents to the adoption of the child by her current placement and opposes her adoption by Ms. Sunderland.

5. There are insufficient allegations in Ms. Sunderland's petition for adoption to provide the Court with reasonable cause to believe that she would be able to prevail on that petition without the consent of DSHS, in whose custody the child currently remains. Ms. Sunderland's adoption petition does not allege that DSHS made any mistake, or in any way acted arbitrarily and capriciously in removing the child from her care or in placing the child in her current home with the petitioners for adoption.

6. There is not reasonable cause to believe that a sufficient factual basis exists, or will exist soon enough, upon which Ms. Sunderland would be able to overcome DSHS' refusal to consent to her petition to adopt this child to justify delaying this child's adoption in order to join the competing petitions. The pre-placement report submitted by Ms. Sunderland in support of her petition for adoption, completed by Don Layton MSW, indicates that, among other things, she would only be a suitable candidate for adoption of this child "if" she continues to engage in active efforts to recover from a longstanding substance abuse problem, moves from her current neighborhood, and engages in parenting classes and counseling. The report specifically indicates that the substance

abuse issues will not be adequately addressed "for at least another six months." That much delay is not in this child's best interests. Furthermore, there are factual assertions in Ms. Sunderland's pre-placement report indicating that the child has been put at risk while in her care.

7. Ms. Sunderland ~~could have made an effort to stay this adoption proceeding, but did not, despite being made aware that the child was soon to be adopted by her current placement.~~ [did not attempt to stay this adoption proceeding /s/ MD].

8. The Juvenile Court, through Cause No. 04-7-00458-2, has reviewed the decision by DSHS to remove the child from Ms. Sunderland's care and approved it. Furthermore, the Juvenile Court, by order filed on October 26, 2005, decided that Ms. Sunderland was not a legal relative to this child and should not be allowed party status in the Dependency because: (1) it was not in the child's best interests to allow her to be a party to that proceeding, (2) Ms. Sunderland is not a legal relative to the child, (3) Ms. Sunderland has previously been determined to be an inappropriate placement for the child and did not appear before the Juvenile Court to challenge or dispute her removal from Ms. Sunderland's care, (4) Ms. Sunderland's motion to intervene was not timely, (5) further delay would jeopardize the child's right to a speedy resolution of the dependency proceeding, because (6) Ms. Sunderland's intervention was likely to inject collateral and/or extrinsic issues into the matter, which would

take time to resolve and adjudicate, thereby causing delay to the original parties to the action.

9. The child is not an Indian child as defined in 25 U.S.C. 1903 as has already been decided by the Snohomish County Court under Cause No. 05-7-00381-9, by order filed on February 23, 2005. Despite this finding, DSHS has re-contacted the Cherokee Tribes to confirm if this child may be enrollable, based on Ms. Sunderland's allegations, and all three Tribes have indicated that the child is not eligible to be registered as a member of those Tribes. [This issue is res judicata. /s/ MD]

It is hereby **ORDERED** that there shall be no further delay to this child's adoption with a fit and proper home and the court shall proceed with the process of finalizing the adoption that is before it today.

DONE IN OPEN COURT this [7 ~~29~~ /s/ MD] day of [December ~~November~~ /s/ MD], 2005.

/s/ Michael T. Downes
JUDGE MICHAEL T. DOWNES

Presented by:

/s/ Linda Passey
LINDA PASSEY #16186
Attorney for the Petitioners for Adoption,

Petitioner for Adoption

Approved for Entry:

[-As to form-]

/s/ Chris Williams
CHRIS WILLIAMS,
WSBA #34521
Assistant Attorney General

KEN YOUNG
Guardian ad Litem

LINDA RICHARDSON
DSHS Social Worker

MONESA SUNDERLAND
Competing Petitioner for Adoption

Petitioner for Adoption

[As to form
KIRSTEN HAUGEN,
Atty for VGAL
Kirsten Haugen #8462]

/s/ Martin Hodges #21818
[for] **KIRSTEN HAUGEN,**
WSBA #8462
Attorney for VGALs

JOANNA BLANFORD
DSHS Social Worker Supervisor

/s/ Richard Okrent
RICHARD OKRENT,
WSBA #15851
Attorney for Monesa Sunderland

THE SUPREME COURT OF WASHINGTON

In re the Adoption of R.L.M., a child under the age of eighteen.	No. 80272-6 **ORDER** C/A NO. 57557-1-I (Filed Feb. 6, 2008)

Department II of the Court, composed of Chief Justice Alexander and Justices Madsen, Chambers, Fairhurst and Stephens, at its February 5, 2008, Motion Calendar, considered whether review should be granted pursuant to RAP 13.4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 6th day of February, 2008.

For the Court

/s/ Gerry L. Alexander
CHIEF JUSTICE

Appendix of State Cases

Alaska: *Carter v. Brodrick*, 644 P.2d 850 (Ak. 1982)

California: *In re B. G.*, 523 P.2d 244 (Cal. 1974)

Colorado: *In re Marriage of Martin*, 42 P.3d 75 (Colo. App. 2002)

Connecticut: *Temple v. Meyer*, 544 A.2d 629 (Conn. 1988)

Delaware: *In re Hart*, 806 A.2d 1179 (Del. Fam. Ct. 2001)

District of Columbia: *Petition of D.I.S.*, 494 A.2d 1316 (D.C. 1985)

Florida: *Wills v. Wills*, 399 So. 2d 1130 (Fla. Dist. Ct. App. 1981)

Louisiana: *Johnson v. Sullivan*, 545 So. 2d 1169 (La. Ct. App. 1989)

Maine: *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004)

Maryland: *S.F. v. M.D.*, 751 A.2d 9 (Md. Ct. Spec. App. 2000)

Massachusetts: *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1996), *cert. denied*, 528 U.S. 1005 (1999)

New Hampshire: *In re Nelson*, 825 A.2d 501 (N.H. 2003)

New Jersey: *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000), *cert. denied*, 531 U.S. 926 (2000)

New Mexico: *Matter of Adoption of J.J.B.*, 894 P.2d 994 (N.M. 1995), *cert. denied*, 516 U.S. 860 (1995)

New York: *Doe v. Doe*, 399 N.Y.S.2d 977 (N.Y. App. Div. 1977)

North Carolina: *Smith v. Barbour*, 571 S.E.2d 872 (N.C. Ct. App. 2002)

North Dakota: *Patzer v. Glaser*, 396 N.W.2d 740 (N.D. 1986)

Oregon: *In re S's Adoption*, 538 P.2d 947 (Or. Ct. App. 1975)

Rhode Island: *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000)

South Carolina: *Middleton v. Johnson*, 633 S.E.2d 162 (S.C. Ct. App. 2006)

Washington: *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005)

West Virginia: *In re Clifford K.*, 619 S.E.2d 138 (W. Va. 2005)

Wisconsin: *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995), *cert. denied*, 516 U.S. 975 (1995)